Supreme Court, U. S.
FILED
FEB 27 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-803

WILLIAM G. BARRY, as Chairman of the New York State Racing and Wagering Board, et al.,

Appellants,

-against-

JOHN BARCHI,

Appellee.

On Appeal from the United States District Court
For the Southern District of New York

MOTION TO AFFIRM JUDGMENT

GRECO & FARALDO
Attorneys for Appellee
125-10 Queens Boulevard
Kew Gardens, New York 11415
(212) 544-6800

JOSEPH A. FARALDO
Of Counsel.

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358

TABLE OF CONTENTS

Page

Opinions and Judgment Below 1

Jurisdiction 2

Questions Presented 2

Statement of the Case 2

The Questions Presented by Appellants Are Lacking of Substance 5

Conclusion 14

CASES CITED

Page

Baggett v. Bullitt, 371 U.S. 360 (1964) 14

Bailey v. Patterson, 369 U.S. 31 (1962) 10

Bell v. Burson, 402 U.S. 535 (1971) 5

Carey v. Sugar, 425 U.S. 73 (1976) 12

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) 10

Ex Parte Poresky, 290 U.S. 30 (1910) 10

Goldberg v. Kelly, 397 U.S. 254 (1970) 5

Goss v. Lopez, 419 U.S. 565 (1975) 5

Hubel v. West Virginia Racing Commissioner, 513 F.2d 240 (4th Cir. 1975) 10

In re Ruffalo, 390 U.S. 544 (1968) 6

Judice v. Vail, 430 U.S. 327 (1977) 14

Matter of Gerard v. Barry, — A.D. 2d — (2nd Dept., 1977) 13

Meachum v. Fano, 427 U.S. 215 (1976) 8

Meyer v. Nebraska, 262 U.S. 43 (1923) 9

Monroe v. Pape, 365 U.S. 658 (1961) 14

Montayne v. Haymes, 427 U.S. 236 (1976) 8

Morrissey v. Brewer, 408 U.S. 471 (1972) 5

Stanley v. Illinois, 405 U.S. 645 (1972) 5

Tappis v. N.Y.S. Racing & Wagering Bd., Harness Racing Division, 36 NY 2d 863 (1975) 12

Vlandis v. Kline, 412 U.S. 441 (1973) 5

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1977

No. 77-803

WILLIAM G. BARRY, as Chairman of the
New York State Racing and Wagering Board, et al.,
Appellants,

-against-

JOHN BARCHI,

Appellee.

MOTION TO AFFIRM JUDGMENT

Appellee moves pursuant to Rule 16(c) to affirm the judgment of the United States District Court for the Southern District of New York entered September 15, 1977 enjoining the enforcement of Section 8022 of the Unconsolidated Laws of the State of New York, as repugnant to the due process and equal protection clauses of the Fourteenth Amendment and submits this motion to affirm the judgment on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINIONS AND JUDGMENT BELOW

The opinion of the three judge District Court for the Southern District of New York is reported at 436 F.Supp. 775 and is reproduced in the appellants' appendix beginning page 3a. The judgment appealed from is

reproduced beginning at page 1a of the appendix. The opinion of the District Court granting appellee's motion to convene a three-judge court is not yet reported. It is reproduced beginning at page 23a of appellant's appendix.

JURISDICTION

The jurisdiction of this Court to affirm the judgment below is conferred by Rule 16(c) of the Supreme Court rules.

QUESTIONS PRESENTED

1. Does a state statute providing for summary suspension of the license of a racing ineustry licensee, pending hearing and determination of disciplinary charges, deny such licensee due process of law by summary deprivation of his right to earn a livelihood?

2. Does such state statute violate equal protection of law, where only a certain class of licensees are disqualified from the issuance of an administrative stay, pending determination?

3. Was there any reasonable basis for the federal courts to have abstained from determining this case, where the language of the statute was not uncertain, the practice challenged widespread, the federal question could not be avoided, and the highest state court had vindicated the practice challenged?

4. May an administrative agency be granted summary power to deprive its licensees of their livelihood by virtue of the acceptance of a license issued under color of state law?

STATEMENT OF THE CASE

Appellee is licensed by appellants, who constitute the three members of the New York State Racing & Wagering

Board, to train and drive harness race horses. He earns his livelihood driving and training for harness horse owners, a clientele that he built slowly and laboriously, but which goodwill ties can quickly vanish with any interruption in the continuity of services supplied by him.

The sequence of events that gave rise to this case are succintly set forth in the opinion of the three judge court, included in appellant's appendix (6a):

> " 'Be Alert' is a harness race horse, owned by an uninvolved third party, and trained at the time this suit was brought by the plaintiff. On June 22nd, 'Be Alert' ran in the third race at Monticello Raceway and placed second. Two days later plaintiff was informed by the presiding steward at Monticello that a post-race urinalysis revealed the presence of 'Lasix' in 'Be Alert's' system. Such treatment of a harness race horse is improper within forty eight hours of a race and violates NYSRWB Rule 4120.4. Barchi declared his innocence in the matter. Thereafter, he was not given access to the analysis, the specimen and was never confronted with the circumstances under which it was taken.
>
> "On June 28th plaintiff voluntarily took a polygraph examination in an effort to establish his non-involvement. The examiner reported that the plaintiff was not lying. A subsequent polygraph examination was administered to plaintiff at the behest of the NYSRWB the next day and the results were similarly exculpatory. Nevertheless, on July 10th, plaintiff received a fifteen-day suspension for violation of the so-called trainer's 'insurer' rule from John Fahey, the presiding steward and judge at Monticello. During the period of his suspension no horse of which he was

the trainer would be allowed entry in races at the track."

The drastic consequences of the suspension were outlined by the three judge court, appellant's appendix (7a):

> "Race horse trainers may be entrusted with the care of a number of trotters at any given time. A trainer's income is derived in large measure from the proceeds of horse races (as opposed to a salary), and, since, harness 'meetings' are sporadic, trainers cannot recapture the racing opportunities lost by missed meetings. Once a trainer is suspended, even for a brief period, an owner will immediately seek the services of another trainer so that the horse is not barred from racing. This change is often permanent in order to avoid further disruption in the care of the animal. Significantly, plaintiff has proffered the affidavit of a third-party trainer/driver who experienced such a loss during a suspension for a similar drug infraction. He had also suffered irreparable damage for a subsequent *ex parte* suspension that was later reversed. Racing opportunities lost because of a suspension cannot be recovered by a later reversal in a review hearing for obvious reasons. Furthermore, defendants do not dispute the fact that a loss of horses in a trainer's stable occasioned during his suspension can often be an irremediable injury, even though such suspension is erroneous and without justification."

The balance of the history of this case in the District Court is depicted in appellant's jurisdictional statement. On July 13th, 1976, a District Court judge issued a temporary restraining order, as an incident to this action, enjoining the Board from further execution of the suspension. A three judge court was subsequently convened. In recognition of the clear cut deprivation of the Constitutional right of licensees of the NYSRWB to earn a livelihood at their chosen occupations, without the basic due process safeguard of the right to a prior hearing on the charges to justify such drastic state action, the three judge court below declared Section 8022 of the Unconsolidated Laws of the State of New York unconstitutional to the extent that it sanctions suspension of a licensee, without prior or meaningful administrative review by a hearing.

Appellants served and filed notice of appeal to this Court and a jurisdictional statement, which is now challenged by appellee on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

THE QUESTIONS PRESENTED BY APPELLANTS ARE LACKING OF SUBSTANCE

A.

Based upon the prior decisions of this Court, the within appeal is insubstantial and obviously without merit. This Court has long ruled that the right to procedural due process applies to a broad spectrum of important private and governmentally created interests. *Education. Vlandis v. Kline*, 412 U.S. 441 (1973); *Goss v. Lopez*, 419 U.S. 565 (1975); *Parole. Morrissey v. Brewer*, 408 U.S. 471 (1972); *Child Custody. Stanley v. Illinois*, 405 U.S. 645 (1972); *Driver's License. Bell v. Burson*, 402 U.S. 535 (1971); *Welfare Benefits. Goldberg v. Kelly*, 397 U.S. 254 (1970); *Public Employment. Slochower v. Board of Education*, 350 U.S. 551 (1956).

Generally, due process requires that notice and hearing precede any deprivation of a protected interest. In

the cases cited above, many required a prior hearing even where the deprivation of the protected interest was not as extreme as in the case at bar. The deprivation here being the loss of the right to earn a livelihood. That there are twelve states out of the thirty involved in racing, as appellants argue, that authorize such highhanded and oppressive procedures against racing licensees is an example of the unnecessary and frightening power, improperly delegated to these administrative bodies, which is clearly repugnant to Fourteenth Amendments safeguards.

It seems unthinkable for the promulgation of a statute that authorized executions or suspensions, without proper notice of charges and an opportunity for a meaningful hearing. *In re Ruffalo*, 390 U.S. 544 (1968). In *Goldberg v. Kelly*, 397 U.S. 254 (1970), this Court made it abundantly clear that welfare benefits may not be cut off, without notice and an opportunity for a prior hearing, holding that the drastic consequences to the recipient, overshadowed the interest of the state in attempting to eliminate fraud in the administration of social welfare laws. It was held that a subsequent hearing was inadequate and not meaningful in view of the irreparable injury and immediate hardship to the welfare beneficiary during the administrative adjudicatory process. That the beneficiary would be entitled to retroactive reimbursementd a subsequent hearing determine that the reasons for cutting off his benefits were without merit, was held insufficient to justify summary termination of benefits. *Arnett v. Kennedy*, 416 U.S. 134 (1974), at first glance seemed to uphold summary suspension prior to an administrative trial. This Court upheld the provisions of the Lloyd-LaFollette Act, authorizing discharge of a federal civil service employee, prior to an administrative hearing, since there was no danger of irreparable damage, should the employee prevail at the subsequently conducted trial type hearing. It was held that if the summary suspension was without basis, the

employee would be reinstated, together with full back pay. His injury, unlike the welfare recipient in *Goldberg*, removed from the social welfare rolls, was not irreparable during the period prior to the adjudicatory phase of his case. It is submitted that were the New York statutory provisions to authorize summary punishment where there is no danger of irreparable injury, it would pass Constitutional muster. Thus, as appellant points out, the United States Court of Appeals in *Ruane v. New York State Racing and Wagering Board*, 532 F.2d 860 (2d Cir. 1976), held that the claim of a jockey fined $250.00 for refusing to fulfill his riding engagement for failure to afford him a prior hearing was frivolous since a subsequent hearing was available, as well as remission of the penalty should he prevail. There was no danger of irreparable injury present. However, in the case at bar, the more drastic punishment of revocation or suspension is at stake with its irremediable consequences.

The trainer who is suspended will invariably suffer irreparable injury. The owners of the horses in his care must look to other trainers to provide the continuous attention the horses require and to avoid the loss of racing opportunities. The change is often permanent and the appellee is never made whole again even if vindicated in the ultimate hearing. The income lost during the period of his suspension is lost forever. His clientele laboriously compiled over a period of years are gone forever, and his business totally destroyed by the suspension. The argument for a prior hearing in the case at bar is even more compelling in the case at bar than in *Goldberg*. For even in *Goldberg*, a welfare beneficiary removed from the rolls, temporary hardship irrespective, can be compensated by a payment of benefits cut off if ultimately vindicated; not so here. In view of these consequences, the scale of conscience, as well as due process, requires that a hearing precede suspension, so that no mistakes are made. Indeed, it is

distasteful for a state administrative agency to show such lack of concern for individual rights, and insist upon clinging to secret proceedings and summary power to ruin the innocent along with the guilty, in the name of the public interest. There is an inherent revulsion against such a system which provides secret proceedings and favors quick sanctions even in the face of a demonstration of innocence.

To compare *Montayne v. Haymes*, 427 U.S. 236 (1976) and *Meachum v. Fano*, 427 U.S. 215 (1976), where this Court declined to interfere with the internal management of prisons and to require a hearing to precede a prison transfer, demonstrates a total lack of understanding of the nature of the right involved in the case at bar. A prisoner does not enjoy a Constitutional right to select his place of incarceration. Appellee, however, does have a Constitutional right to freedom from unreasonable interference with his right to earn a livelihood. The concept of Constitutionally protected liberty includes "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness." *Meyer v. Nebraska*, 262 U.S. 43 (1923).

Appellants misguidedly rely upon *Dixon v. Love*, 431 U.S. 105 (1977), where this Court approved summary suspension of a driver's license based upon statutorily designated frequency of traffic convictions. The court pointed out that the petitioner had been accorded a hearing for each offense for which he had been convicted and which, when added up, became the basis for the loss of his driver's license. Thus, to afford him a further hearing would be of little, if any, value. The only issue was the mathematics, to wit: the number of convictions for the

designated traffic offenses within a fixed period, for which the statute required license suspension. Moreover, the Court took pains to point out that the state legislation safeguarded the livelihood of the driver, by providing for a limited license allowing him to drive in the course of his employment, if necessary to his livelihood. Thus, the court recognized the primacy of the right of the individual to earn his livelihood and sanctioned summary proceedings, in view of the statutory safeguard that the right to drive not be in total suspension, where it is necessary to enable the driver to earn a livelihood.

In *Dixon v. Love*, this Court stressed that in reality, the licensee had been accorded hearings on each offense that went into the accumulation that required suspension of his license:

> "Moreover, the risk of an erroneous deprivation in the absence of a prior hearing is not great. Under the Secretary's regulations, suspension and revocation decisions are largely automatic. . . . In this case appellee had the opportunity for a full judiciary hearing in connection with each of the traffic convictions on which the Secretary's decision was based. Appellee has not challenged the validacy of those convictions or the adequacy of his procedural rights at the time they were determined."

Dixon v. Love, in each measure of its *ratio decendi*, supports the position of appellee. It is difficult to surmise why appellant takes comfort from its teachings.

the possibility of civil and criminal sanctions for abuse, was deemed an adequate safeguard to assure against improper exercise of the right of a teacher to spank a child, without a prior hearing in *Ingraham v. Wright*, 430 U.S. 651 (1977). Contrast that safeguard with the immunity from suit of the Commissioners of the NYSRWB, should it

ultimately be determined that summary suspension was unjustified.

Hubel v. West Virginia Racing Commissioner, 513 F.2d 240 (4th Cir., 1975), to the extent that it approves of summary deprivation of the livelihood of horse racing licensees, should be deemed overruled. To insure public confidence in the integrity of racing is no more justification of the infringement of fundamental due process by suspending licenses prior to a hearing, than would be such procedures for other occupations or citizens, if done in the name of insurance of public confidence in other occupations. The distribution of alcoholic beverages is just as tightly regulated in New York State as horse racing. Yet, such licensees may not be deprived of licenses, without the due process requirement of a prior hearing, public confidence notwithstanding. See, Section 100 et seq., *New York State Alcoholic Beverage Control Law*. Indeed, public confidence must be maintained in all professions and occupations. However, the price of summary deprivation of a livelihood, predicated on mere accusation, has been deemed to be too drastic and draconian for all other professions, occupations, and citizens.

To rationalize that the remote posibility of a public danger is the *sine qua non* for all summary administrative adjudication is to universally justify ex parte secret proceedings. The dishonest racing trainer is no more dangerous to the public than the mugger, dishonest lawyer or dishonest pharmacist. The latter are afforded a trial, prior to the infliction of sanctions. There is no reason why the former is not entitled to the same considerations, especially where his professional life is at stake. The time is long overdue for such pronouncement to be made for the racing industry.

Therefore, based upon the prior decisions of this Court, the within appeal is insubstantial and obviously without merit. *Ex parte Poresky*, 290 U.S. 30 (1910); *Bailey v. Patterson*, 369 U.S. 31 (1962).

B.

The court below was not only correct in finding that Section 8022 of the Unconsolidated Laws of the State of New York violated the due process of law clause as well, in that Section 7915 of the Unconsolidated Laws of the State of New York does not prohibit stays of execution of suspension, where charges are brought against thoroughbred race horse licensees, while such stays are prohibited by the language of Section 8022, *supra*, for harness racing licensees. Appellants have all but conceded that there is no rational distinction between the two classes of licensees for procedures to be more harsh for one than the other. However, it is the argument of appellants that in spite of the command of Section 8022, *supra*, not to grant any stays of execution of suspension against harness racing licensees, appellants, on their own, often defy the statute and grant such stays.

Section 8022, *supra*, provides, concerning summary suspension of harness racing licensees who demand an administrative hearing, "pending such hearing and final determination thereon, the action of the commission . . . suspending a license . . . shall remain in full force and effect." Appellant has truthfully wasted the valuable judicial time of the court below. On the one hand, it argues that it does not give service to Section 8022, in that it often disregards the plain language of the statute and stays execution of suspension for harness race licensees, despite the statutory prohibition. If this be true, appellants should join in the argument of appellee that the statute is unconstitutional and point to its own claimed refusal to adhere to it, as evidence that it offends equal protection of law safeguards.

In any event, this secondary issue does not really reach the crux of the prime Constitutional issue, which is that no licensee should be deprived of his occupation without a

prior hearing. Whether appellant occasionally grants a stay of suspension to a licensee summarily suspended by a steward is of no Constitutional significance. The point is that no licensee should have to live in the terror that an unfounded charge might well mean the cessation of his livelihood and the destruction of a business that he laboriously built.

C.

There is no basis for the doctrine for abstention to be applied in the case at bar. The New York State Court of Appeals in a relatively recent case, *Tappis v. New York State Racing & Wagering Board, Harness Racing Division*, 36 N.Y.2d 863 (1975), made it crystal clear that the state approves of the statute that singles out licensees in the harness racing industry to be subject to summary suspension, writing:

> "The compelling and substantial state interest involved in maintaining discipline among trainers and owners . . . so as to preclude the appearance or the fact of impropriety, justifies on-the-spot sanctions and penalties in advance of hearings and the procedure . . . followed involved no infringement of petitioner's constitutional rights and complied sufficiently with the requirements of the due process clauses of the Federal and State Constitutions."

Thus, there is no reason to abstain. The highest state court has already pronounced upon the issue. The construction that it has given to Section 8022, *supra*, leaves no escape hatch through which the federal question can be avoided. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964); *Carey v. Sugar*, 425 U.S. 73 (1976).

Appellant makes reference to *Matter of Gerard v. Barry*, ——A.D.2d—— (2nd Dept., 1977), where the Appellate Division, Second Department, affirmed the order of Nassau County Supreme Court, enjoining the same appellants as in the case at bar, from enforcing a summary suspension of licensee, without a hearing. The Appellate Division affirmed, without opinion, the opinion of Nassau County Justice Velsor, who relied upon the case at bar, in declining to follow the New York Court of Appeals *Tappis* decision, writing as follows:

> "The precise question was presented to a constitutionally organized three-judge Federal Court in the most recent case of *Barchi v. Sarafan* et al (decided August 18, 1977) in the United States District Court for the Southern District of New York. That Court found Section 8022 of the Unconsolidated Laws of New York (applicable to harness racing) unconstituional on two grounds; the first, by parallel reasoning aiplicable to the facts of this case, because a licensed trainer was disciplined without either a pre-suspension hearing, or a prompt post-suspension hearing. I do not find any substantive distinction which would merit consideration in the perception that Barchi, supra, involved harness racing, and the instant case pertains to 'flat' racing. Accordingly, it must be assumed as binding that absent any meaningful difference between revocation and suspension, and between harness racing and 'flat' racing, a disregard or deprivation of procedural due process in affording a licensed employee a hearing with the constitutional safeguards of the right to confront and cross-examine, is an unconstitutional invasion of a citizen's right to due process."

Thus, it is the decision in the case at bar, that has guided state courts on the long delayed route to due process of law.

in this circumscribed area of occupation. It can be now said that state law has been upset as a result of the decision in the case at bar.

Nor are any of the other classic reasons for abstention present in the case at bar. There is no competing action between the parties pending in a state court where appellee would have opportunity to litigate the issue herein, that should impel a federal court to abstain. *Judice v. Vail*, 430 U.S. 327 :1977).

Federal courts have clear cut original jurisdiction to entertain actions brought to vindicate civil rights. *Monroe v. Pape*, 365 U.S. 658 (1961); *Baggett v. Bullitt*, 371 U.S. 360 (1964); *NAACP v. Brnnett*, 360 U.S. 471 (1961).

CONCLUSION

THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED PURSUANT TO RULE 16 OF THE RULES OF THIS COURT.

Respectfully submitted.

GRECO & FARALDO
Attorneys for Appellee
Office & P.O. Address
125-10 Queens Boulevard
Kew Gardens, New York 11415
(212) 544-6800

Joseph A. Faraldo
Of Counsel